UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT
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April 6, 1998

TO: All Recipients of the Captioned Order and Judgment
RE: EO-97-051 & EO-97-054, Nemecek
Filed April 2, 1998 (Pearson, J.)

Please be advised of the following correction to the captioned decision:

Bottom of page 2: Insert the word "a" between "shown" and "number" in the sentence, "At that time, the Bank officer was shown number of cattle owned by another rancher, David Tollett."

Please make this correction to your copy of the decision.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By:
Deputy Clerk

FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

April 2, 1998

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE TONY A. NEMECEK and DIANA JO NEMECEK, Debtors.	BAP No. EO-97-051 BAP No. EO-97-054
FIRST NATIONAL BANK & TRUST COMPANY OF ADA, Plaintiff - Appellee - Cross-Appellant, v. TONY A. NEMECEK and DIANA JO NEMECEK, Defendants - Appellants - Cross-Appellees.	Bankr. No. 96-71158 Adv. No. 96-7128 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma

Before PUSATERI, PEARSON, and MATHESON, Bankruptcy Judges.

PEARSON, Bankruptcy Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal, and therefore grants the debtors' request for a decision on the briefs without oral argument. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore submitted without oral argument.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

The debtors appeal from an order by the United States Bankruptcy Court for the Eastern District of Oklahoma holding their debt to the First National Bank & Trust Company of Ada to be nondischargeable under 11 U.S.C. § 523(a)(2).[1] The Bank cross appeals from the trial court's overruling of its claims that the debtor should be denied a discharge under several subsections of § 727. For the reasons discussed below, we vacate and remand to the trial court with directions to make separate findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52.

Facts

The debtors are, among other things, farmers and ranchers. In September of 1993, Tony Nemecek[2] submitted a handwritten, unsigned financial statement to the Bank in support of a requested cattle loan. Diana prepared the financial statement but did not sign it or the loan papers. The debtors had a cow calf operation on leased land in two locations. Tony sought to borrow money to increase the size of their herd. The financial statement listed as assets cattle and equipment valued at over $270,000, including two trailers valued at $2,500 that the debtors did not own but were merely using, and $9,000 in unencumbered vehicles. A Bank officer conducted a field inspection of the cattle and equipment on the financial statement and the Bank approved the loan in the amount of $145,000. The Bank advanced $145,000 to the debtors over a period of time for the purchase of cattle.

In February 1994, the Bank officer again inspected the debtor's cattle. At that time, the Bank officer was shown a number of cattle owned by another rancher, David Tollett. In early September 1994, the Bank asked for updated financial information and pointed out that the loan was to be paid off by the end

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[1] All references to a section are to the respective section of Title 11, United States Code, unless otherwise noted.

[2] To avoid confusion, the court will refer to the debtors by their first names since their separate discharges must be considered individually.

of the year. In response, the debtors both signed and submitted a financial statement dated October 1, 1994. The loan was extended to September of 1995 with a balance of $131,771.14.

In September 1995, the debtors made a payment of approximately $10,000 on accrued interest. Over the next three months, the debtors and the Bank discussed repayment options, and when Tony advised that the calves (from which repayment was to have been made) were "too small," the Bank conducted another field inspection on December 28, 1995. At that time, Tony showed the officer 180 cattle. Because the Bank believed that there was an unexplained difference of 87 cattle, it demanded payment of both the cattle note on which Tony alone was liable and a real estate loan for which both the debtors were liable. The real estate loan is not involved in this appeal.

At some point thereafter, the debtors filed a voluntary petition under chapter 12 in the Western District of Oklahoma. The case was transferred to the Eastern District of Oklahoma, and ultimately converted to chapter 7. The Bank filed an adversary seeking to deny the debtors' discharge under § 727 and to have its debt excepted from the general discharge under § 523(a)(2). Although the original complaint did not mention § 727(a)(3), a claim based on that section was included in the final pretrial conference order included in the record on appeal. One of the § 727 claims was abandoned prior to or at trial. After trial, although the bankruptcy court overruled the Bank's other § 727 claims, it did not rule on the § 723(a)(3) claim. It did hold that the Bank's claim against *both* debtors was nondischargeable under § 523(a)(2).

The debtors appeal the holding under § 523(a)(2) that the Bank's claim is excepted from their discharge, and the Bank appeals the holding overruling its claims under § 727.

Appellate Jurisdiction

This Court, with the consent of the parties, has jurisdiction to hear appeals

from final judgments, orders and decrees, and with leave of the Court, from interlocutory orders and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1). The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Findings of fact are not to be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013. *See First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-4 (10th Cir. 1985). The clearly erroneous standard does not apply to the bankruptcy court's conclusions of law. Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

Here, however, we do not reach the merits of the appeal or cross appeal because we conclude that the trial court's findings of fact and conclusions of law do not comply with Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. Accordingly, we vacate and remand for entry of separate findings and conclusions in conformance with those rules. At the same time, the trial court should address the Bank's § 727(a)(3) claim and the debtors' claim that Diana is not liable for the debt to the Bank and therefore cannot owe it a nondischargeable debt.

DISCUSSION

Without belaboring the form of the opinion and order appealed, we note that the bankruptcy court made all of its findings and conclusions in narrative form. While it appears to have considered, at least briefly, some of the elements of each legal issue before it, we cannot review either its findings of fact or conclusions of law in their present form.

As the Tenth Circuit has held:

> Rule 52(a) provides that a district court "shall find the facts specially and state separately its conclusions of law thereon." This rule serves to (1) engender care on the part of trial judges in ascertaining the facts; and (2) make possible meaningful appellate review. *Ramey Constr. Co., Inc. v. Apache Tribe*, 616 F.2d 464, 466-67 (10th Cir. 1980). Thus, the touchstone for whether findings of fact satisfy Rule 52(a) is whether they are "sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts" so as to facilitate a "meaningful review" of the issues presented. *Otero v. Mesa County Valley Sch. Dist.*, 568 F.2d 1312, 1316 (10th Cir.

> 1977). If a district court fails to meet this standard--i.e. making only general, conclusory or inexact findings--we must vacate the judgment and remand the case for proper findings. *Battle v. Anderson*, 788 F.2d 1421, 1425 (10th Cir. 1986). *See Roberts v. Metropolitan Life Ins. Co.*, 808 F.2d 1387, 1390-91 (10th Cir. 1987).

Wolfe v. New Mexico Dep't of Human Servs., 69 F.3d 1081, 1087 (10th Cir. 1995) (footnotes omitted).

In its opinion, the trial court set out brief discussions of law and facts as to most claims, and none at all as to the Bank's § 727(a)(3) claim. For example, as to the § 727(a)(4) claim, the court found no fraudulent intent on the part of the debtors. Implicit in that statement is a conclusion that the debtors somehow made a false statement but without the requisite intent under § 727(a)(4). Yet, because of the form of the findings, we cannot review the basis for either the conclusion that the debtors made a false statement in connection with the bankruptcy case, or that they lacked the requisite intent.

Similarly, with respect to the § 727(a)(2) claim, the trial court concluded that the debtors did not hide or shield any assets from the Bank. Again, we cannot review the conclusion without a more detailed discussion of the facts and applicable law.

Finally, the trial court concluded that "the debtors made a materially false representation upon which the Bank relied." It therefore held the debt to the Bank to be nondischargeable. From the discussion by the trial court, that conclusion was apparently based on the inclusion in their financial statement of two trailers that the debtors did not own. The conclusion does not address how Diana is liable on the debt, or how material the inclusion was by comparing the value of the trailers to the overall value of the assets listed on the financial statement and considering the Bank's failure to take the unencumbered vehicles as additional collateral.

While no particular form of findings and conclusions is required under Fed. R. Bankr. P. 7052, meaningful review is facilitated if the trial court sets out

any stipulated facts and thereafter makes specific, separate findings as to each disputed factual element of the causes of action involved. If the court were thereafter to set out its conclusions of law, we could make the meaningful review required. Here, it appears that the trial court omitted the Bank's claim under § 727(a)(3), and remand is clearly required on that issue. Likewise, the general conclusion that both debtors are responsible for a nondischargeable debt to the Bank does not seem correct in view of the documents and apparent concessions by the Bank in its briefs, yet we cannot determine whether the trial court considered the § 523 claim as to each debtor separately. As to the Bank's two § 727 claims the trial court rejected, we cannot conclude whether the court considered all the necessary factual and legal elements.

CONCLUSION

For the reasons set forth above, the order of the bankruptcy court is VACATED. We REMAND the appeal and the cross appeal to the trial court for entry of findings of fact and conclusions of law in conformity with Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52 with respect to all claims tried under the pretrial order.